83-875

Office - Supreme Court, U.S.
FILED
NOV 25 1983
ALEXANDER L. STEVAS,
CLERK

No. A-218

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WANDA WRIGHT SCHAAB, - - - Petitioner,

versus

MARIE SCHAAB and
ARLENE M. GITTINGS, - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

WANDA WRIGHT SCHAAB
6405 Shadow Wood Drive
Prospect, Kentucky 40059
502-228-8200
Attorney pro se.

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3681, LOUISVILLE, KY.

QUESTIONS PRESENTED

I. Whether due process of the law has been denied Petitioner by a dismissal of appeal by Court of Appeals of Kentucky prior to a review of appeal due to the Respondents, their counsel and the trial court not requiring all indispensable and necessary parties be properly served with summons or warning order and brought before the Court prior to trial.

II. Whether it was Petitioner's (Defendant in trial court) or Respondents (Plaintiffs in trial court) responsibility to bring all the necessary parties before the trial court prior to trial, either by warning order for out of state parties or by summons, in which was never complied with.

III. Whether it was Petitioner's procedural duty to name in her Notice of Appeal to Court of Appeals of Kentucky, all the necessary parties whom were never made parties before the trial Court (about fourteen all together) except the only two (named herein in style of case) whom brought suit against the Petitioner herein, and the other twelve were never joined as plaintiffs therein.

IV. Whether the Court of Appeals of Kentucky and the Supreme Court of Kentucky exercised justice by resorting to a procedural rule technicality of all necessary parties not being named in Petitioner's notice of appeal, pro se, when in fact and a matter of record the Respondents and their counsel and the trial court refused to legally and properly adjoin and bring all the necessary and indispensable parties into the suit at issue.

V. Whether Petitioner is subject to further suits of litigation due to appeals courts rulings, in accordance with KRS 394.260 and KRS 394.380, by heirs not being brought in properly before the trial court in-

asmuch as Petitioner is continuously threatened with fraud by counsel for Respondents over parts of estate not collected by the Curator (furniture and automobile).

TABLE OF CONTENTS

	PAGE
Questions Presented	i– ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1– 2
Constitutional Provision	2
Statement of the Case	2– 5
Reasons for Granting Writ	5– 8
I. The Opinion of Court of Appeals of Kentucky and the Order Denying Discretionary Review by Supreme Court of Kentucky Should Be Reversed Due to a Denial of Justice Being Rendered and Substituted With a Technicality of a Procedural Rule of Requiring That All Necessary Parties Be Named in a Notice of Appeal Addressed to the Court of Appeals of Kentucky When in Fact All the Necessary Parties Except Two Were Never Brought Before the Trial Court with a Summons or Warning Order Properly Which Contradicts Naming Them in a Notice of Appeal to Appeals Court Except the Two Styled in the Case Herein Whom Brought Suit Against Petitioner Herein.	
Conclusion	9
Appendix	11–13
Order of Court of Appeals of Kentucky (Dated 6-10-82)	11
Order of Court of Appeals of Kentucky (Dated 12-2-82)	12
Order of Supreme Court of Kentucky Denying Discretionary Review	13

TABLE OF AUTHORITIES

PAGE

Russell v. *Grumbley's Ex'r,* 160 S. W. 2d 321 (Ky. Stat. § 4859) revised under KRS 394.260 and 394.280 7

The Ky. Digest Vol. 19, Key #359, P. 138, Ky. 1938 & 1942 7

Ky. St. Key Nos. 4850, 4857, 4860, 4861 7

Security Trust Co. v. *Swope,* 274 Ky. 99, 118 S. W. 2d 200 8

McComas v. *Hull,* 274 Ky. 192, 118 S. W. 2d 540 8

Ky. Digest Vol. 19, Key No. 361, P. 139, Ky. 1903, 1938, & 1942, *Bohannon* v. *Tabbin,* 76 S. W. 46, 25 Ky. Law Repr. 515. 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. A-218

WANDA WRIGHT SCHAAB, - - - *Petitioner,*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS, - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

OPINION BELOW

The only opinion below was reported by the Court of Appeals of Kentucky on June 10, 1982, an Order dismissing Petitioner's appeal and another Order dated December 2, 1982, wherein the Court of Appeals of Kentucky clarified their order of June 10, 1982, wherein they admitted dismissal was for Petitioner's failure to include indispensable parties in her notice of appeal. These orders are printed in the appendix.

Thereafter no opinion was given by the Supreme Court of Kentucky which is the state court of the last resort in denying discretionary review on July 31, 1983. (Order included in appendix).

JURISDICTION

The judgment sought to be reviewed was entered on July 31, 1983, when the Supreme Court of Kentucky

denied Petitioner's Motion for Discretionary Review. Jurisdiction is conferred upon this Court by the Fourteenth Amendment of the Constitution of the United States and a denial of due process of the law.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law, nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

Petitioner herein has requested and obtained two thirty day extensions of time to and including November 27, 1983, in which to timely file her petition for writ of certiorari herein.

This action was instituted in the Jefferson Circuit Court in Louisville, Kentucky, herein a last will, naming petitioner as beneficiary, wife of the decedent's estate, was attacked by the two Respondents herein wherein they brought suit against Petitioner and the legal will of Petitioner's husband was illegally invalidated by a mock trial, which was set up and Petitioner was framed as this Court will take notice by the two Affidavits of one of the jurors and Petitioner that was included for consolidation and made a part of Discretionary Review in Supreme Court of Kentucky,

which record was certified and sent to the Supreme Court of the United States. At the trial, the trial judge instructed the jury to consider only two issues at the beginning of the trial namely, whether the deceased was competent or not at the time he made his last will, and the other issue of undue influence by the petitioner. Then at the end of the trial after all evidence had been presented, and just prior to jury deliberations, the same trial judge instructed the jury to then consider an extra issue whether the Petitioner's marriage was valid or not, all contrary to any statutes regarding marriages. Other accusations were leveled during the trial such as fraud, conspiracy, holding the deceased against his will by force, etc.

The estate at issue contains in excess of $60,000.00 consisting of certificates on deposit, a note for the sale of a construction business, plus interest accrued therein (all in the possession of a curator appointed by the Jefferson Circuit Court). The estate also consists of some furniture and an automobile (which was never collected or requested be held by curator).

Petitioner filed notices of appeal from judgment of trial verdict on December 29, 1981, January 12, 1982 and February 1, 1982, all of which were styled and naming the only two plaintiff parties (Respondents herein) that brought suit against Petitioner in the Jefferson Circuit Court. All the additional necessary parties named in the will and others not named in the will were never legally and properly brought before the trial court by the Respondents and their counsel, either by warning order or by summons, namely, Ray-

mond Schaab, Frank Schaab, Fred Schaab, Verda McKeon, Katie Assay and Louis Thurman, and also any children of a deceased brother of Carl N. Schaab who would have fallen heir to said estate had there been no will at all.

A request by written motion before trial, and an oral motion during trial for necessary parties to be brought before the court or for case dismissal which was mandatory by statute if all indispensable parties were not brought in before the court, was made by the petitioner in the Jefferson Circuit Court either by warning order or summons, and the trial court never rendered a ruling on Petitioner's motion, and after a special trial judge was then appointed by the Supreme Court of Kentucky (Chief Judge) to try the case, Petitioner requested that the case be dismissed prior to trial and during trial on the grounds that all the necessary or indispensable parties were never made parties in the case, but the trial judge merely stated that "he was ruling that all the parties were before the Court and was making them parties right then". Such a statement and ruling made by trial judge orally was a farce, sham and mockery and the trial judge knew right then that most of the indispensable parties were not at the trial, had never been present and were in other states and about only six or seven of approximately fourteen heirs were present during direct examination by the plaintiffs and then they vanished and left the trial, and Petitioner called them as her witnesses (they were under subpoena) when she was

presenting her defense and the trial court never compelled them to come forward as Petitioner's witnesses.

Counsel for Respondents herein will falsely state and try to mislead this Honorable Court to believe that all the heirs and parties necessary were brought in before the court, and if this Court could see transcript of record, proof would be that Petitioner is presenting the truth to this Court of how her rights were violated under the Constitution and due process of the law was denied her all throughout the entire proceeding.

REASONS FOR GRANTING WRIT

I. The Opinion of Court of Appeals of Kentucky and Order Denying Discretionary Review by Supreme Court of Kentucky Should Be Reversed Due to a Denial of Justice Being Rendered and Substituted With a Technicality of a Procedural Rule of Requiring That All Necessary Parties Be Named in a Notice of Appeal Addressed to the Court of Appeals of Kentucky When in Fact All the Necessary Parties Except Two Were Never Brought Before the Trial Court with a Summons or Warning Order Properly Which Contradicts Naming Them in a Notice of Appeal to Appeals Court Except the Two Styled in the Case Herein Whom Brought Suit Against Petitioner.

The factual dispute herein involves Petitioner's denial of due process of the law under the Constitution of the United States, Amendment Fourteen wherein her rights to have the Jefferson Circuit Court judgment reviewed on appeal to the Court of Appeals of Kentucky was denied and dismissed before transcript of trial was prepared and filed, and also before briefs were perfected and filed, the dismissal taking place during

the time and before several pending issues before the Court of Appeals could be resolved prior to the preparation of trial transcript, namely a forma pauperis request filed to proceed on appeal, plus a motion for extension of time for the appeal to file a designation of record pursuant to CR 75.01, and for the Clerk of the Jefferson Circuit Court to certify the record on appeal. On or about that same time, May 5, 1982, counsel for Respondents filed a motion in the Court of Appeals to dismiss Petitioner's appeal — misleading the Court of Appeals that all the necessary parties were properly before the Jefferson Circuit Court and inferring that Petitioner was the one who failed to name them in her notice of appeal. It is evident from the rulings in Orders dated June 10, 1982 and December 2, 1982, that the Court of Appeals of Kentucky has ruled accordingly to the untrue verbal information received by them from counsel for the Respondents in his motion to dismiss Petitioner's appeal to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky erred by not requiring the Respondents to furnish a court transcript of record of the proof as to whether all the necessary parties were or were not before the Court properly. Petitioner had no chance to respond with a reply to the motion to dismiss appeal since the Court of Appeals had forwarded a copy of the dismissal Order direct to counsel, Thomas Clay, at that time who was representing Petitioner ineffectively by allowing the time limit to expire for filing fee of $100.00 in appeal, plus he neglected to file a counter reply in behalf of Petitioner to Respondents motion to

dismiss Petitioner's appeal. Petitioner was never notified by Mr. Clay of the Court of Appeals dismissal Order of June 10, 1982, nor that a reply was never filed by Mr. Clay in answer to the Respondents motion to dismiss Petitioner's appeal. Shortly thereafter, Mr. Clay went off Petitioner's case after having failed to protect Petitioner's rights therein.

There are several major reasons and cases cited that the Court of Appeals dismissal orders should be reviewed and they be ordered to allow Petitioner to file an appeal and to review such appeal.

Respondents never complied with *KRS 394.260 and KRS 394.280* which Statutes are mandatory in the trial Circuit Court before a trial can be held, as is clearly set forth in *Russell* v. *Grumbley's Ex'r,* 160 S. W. 2d 321 (Ky. Stat. § 4859) *revised under KRS 394.260 and KRS 394.280.*

Paragraph 3 in Russell v. *Grumbley's* clearly states that the person appealing the County District Court probate will to Circuit Court places the duty upon the Appellant (Respondents herein) to Circuit Court of bringing all the necessary parties who held an interest in testator's estate.

The Ky. Digest Vol. 19, Key #359, P. 138, Ky. 1938 & 1942 clearly defines when the appeal is taken to the Circuit Court all the necessary parties must be brought before the Court, *Ky. St. Key Nos. 4850, 4857, 4860, 4861,* and the Appeal Court justly ruled that the Circuit Court was in order by dismissing case before trial since all the necessary parties were not before the Court. (Appeal affirmed Circuit Court case dismissal).

See also Security Trust Co. v. *Swope,* 274 Ky. 99, 118 S. W. 2d 200.

In *McComas* v. *Hull,* 274 Ky. 192, 118 S. W. 2d 540, many of the contestees were not before the Court, who were *sui juris* and therefore had right under appeal, were entitled to a reversal of judgment setting aside the will, in order that all necessary parties might be brought before the court, since without all the parties there could be no final determination of the will contest. *See Ky. Digest Vol. 19, Key No. 361, P. 139, Ky. 1903, 1938 & 1942; Bohannon* v. *Tabbin,* 76 S. W. 46, 25 Ky. Law Repr. 515.

Petitioner submitted her notice of appeal to the Court of Appeals of Kentucky in the same manner and style that the trial court was conducted in the lower court without all the necessary parties properly before the Court. That fact was made known to the Court of Appeals after they dismissed Petitioner's appeal on June 19, 1982, wherein a motion for reconsideration on June 19, 1982, revealed such inconsistencies of the law in the lower court, even though the transcript was never prepared for appeal, which would allow greater consideration by this highest court of the land to grant a writ of certiorari in order for the Petitioner to be allowed enough time to obtain the transcript of trial record and to file appeal briefs in an appeal review.

CONCLUSION

Respectfully, the Supreme Court of the United States should render a clarification for future referenced cases guarding against state courts such as Kentucky dismissing appeals that are appealed as a matter of right for justice sake and to guard against dismissals due to procedural technicality of necessary parties not named in notice of appeal that were never parties in trial court when it was the Respondents and their counsel's responsibility to bring all necessary indispensable parties before the court and not the petitioner's responsibility.

Respectfully submitted,

WANDA WRIGHT SCHAAB
6405 Shadow Wood Drive
Prospect, Kentucky 40059
502-228-8200

Attorney pro se.

APPENDIX

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - *Appellant*

v.

MARIE SCHAAB & ARLENE M. GITTINGS - - *Appellees*

Appeal from Jefferson Circuit Court
Action No. 79-CI-04025

ORDER

BEFORE: VANCE, GANT, AND HOWERTON, JUDGES.

The Court, having considered the motion to dismiss the appeal, and being otherwise sufficiently advised, ORDERS that the motion be GRANTED and the appeal is hereby DISMISSED, no response to the motion having been filed.

Appellant's motion for an enlargement of time in which to file a designation of record and to obtain certification is hereby DENIED.

The motion of Thomas E. Clay to withdraw as counsel of record for appellant is DENIED AS MOOT.

Entered: 6-10-82

(s) Roy N. Vance
Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable C. V. Sanders, Special Judge
Civil Action No. 79-CI-04025

ORDER

BEFORE: GANT, HOWERTON and VANCE, Judges.

The Court, having considered the motions to reconsider the order dismissing the appeal for failure to include indispensable parties in the notice of appeal, the responses thereto, and being otherwise sufficiently advised, ORDERS that the motions to reconsider be and they are hereby DENIED.

The motion of Edward Harrington, Jr. to be substituted as counsel of record for appellant and the motion of Thomas E. Clay to withdraw as counsel of record are hereby GRANTED.

Entered: 12-2-82

(s) Roy N. Vance
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

82-SC-1043-D
(82-CA-911-I and 82-CA-515-MR)

WANDA WRIGHT SCHAAB - - - - - - *Movant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - *Respondents*

Jefferson Circuit Court
79-CI-04025

ORDER DENYING DISCRETIONARY REVIEW

The motion of Wanda Wright Schaab for a review of the decision of the Court of Appeals is denied.

Gant and Vance, JJ., not sitting.

Entered June 30, 1983.

(s) Robert F. Stephens
Chief Justice